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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SERV-A-PORTION, INC.,
and
DI GIORGIO CORPORATION,

Petitioners,

v.

J.F. FEESER, INC., and
JUNIATA FOODS, INC.,

Respondents.

REPLY MEMORANDUM

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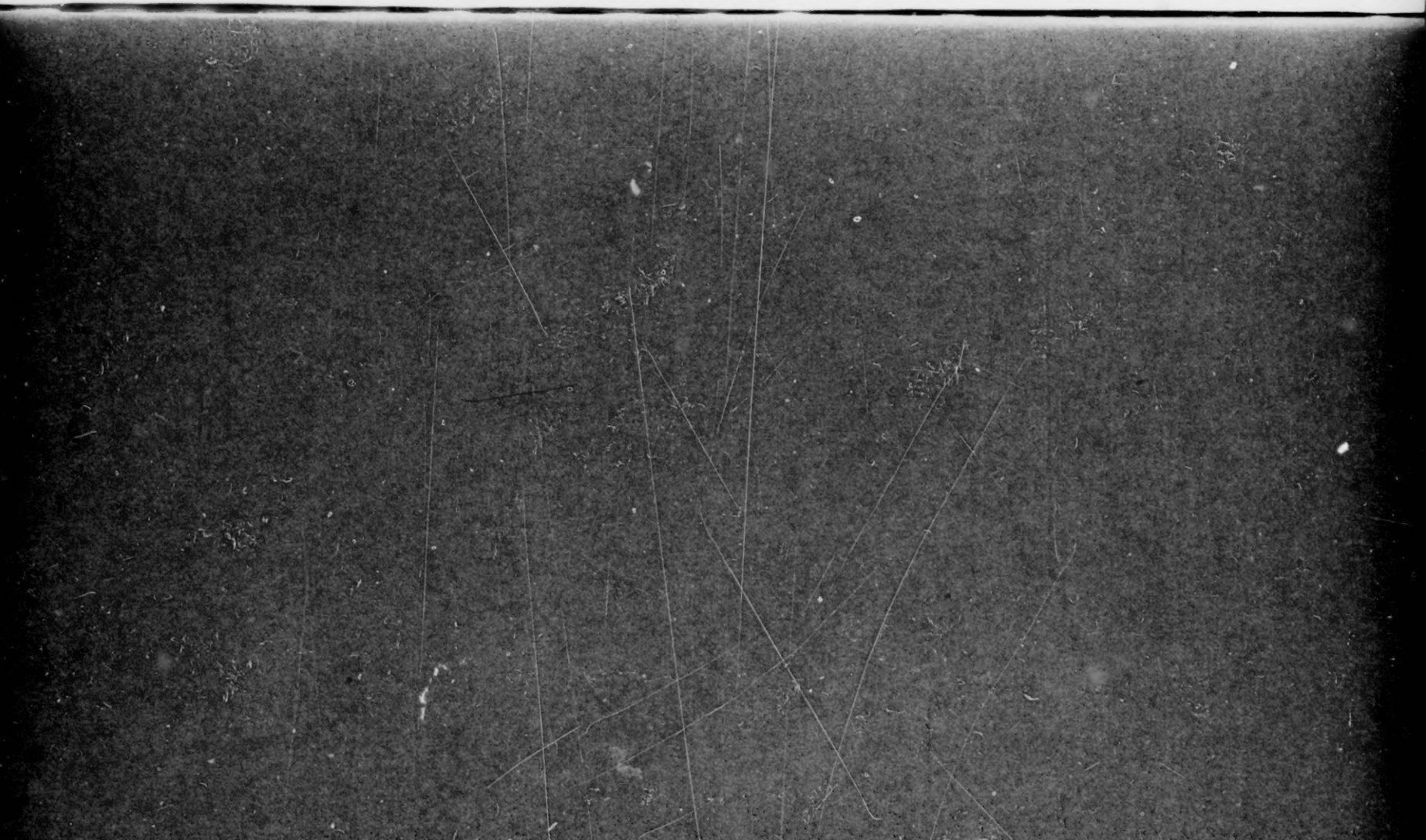

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REPLY MEMORANDUM

Feeser makes two arguments for denying the Petition for Certiorari: 1) that this Court must review a "voluminous (though incomplete) evidentiary record" (Opp. at 8) and resolve factual disputes to decide the issues presented for review; and 2) that there is no conflict among the circuits because the court below applied "well-established" principles that have been "routinely" and consistently applied by the lower courts. Opp. at 9. Both arguments are without merit.

A. The Petition Presents Purely Legal Questions of Critical Importance to the Federal Antitrust Laws.

Feeser argues that "the extremely fact-bound nature of the requested inquiry, as well as the interlocutory status of the case . . . , render it particularly unsuitable for review." Opp. at 8. However, this argument depends upon a mischaracterization of the questions presented.

1. As petitioners have demonstrated, Pet. for Cert. at 11-21, the decision below reflects and amplifies serious conflicts among the circuits and compounds the reigning confusion regarding the appropriate legal standards to be applied by district courts under the Robinson-Patman Act. Indeed, the courts have reached a point of irreconcilable differences as to the appropriate standards for determining competitive injury under § 2(a) of that Act. "Polar opposite" views[1] have produced a controversy that "continues to rage" over this requirement of Robinson-Patman. *See, e.g., Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990). The Third Circuit's holding in this case that the competitive injury requirement may be met by proof of injury to a single competitor squarely conflicts with the decisions of the Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits.[2] Furthermore, the Court

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[1] *Boise Cascade Corp.*, 5 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.) ¶ 22,902, at 22,584 (FTC Nov. 1, 1990).

[2] *See* Pet. for Cert. at 12-16.

Appeals' conclusion that the *Morton Salt*[3] inference analysis can be employed to avoid summary judgment in the face of uncontradicted evidence of a vibrantly "competitive industry" (Opp. at 10) cannot be reconciled with the D.C. Circuit's decision in *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988), as well as decisions of other circuits.[4] Finally, the Court of Appeals' decision resuscitates the "automatic damages" rule for determining antitrust injury under § 4 of the Clayton Act that was rejected by this Court in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

To resolve these issues, this Court need not sift through a voluminous record or resolve disputed facts.[5] It need

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[3] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

[4] *See* Pet. for Cert. at 18.

[5] Feeser's attempts to create a factual controversy that is relevant to the issues presented by the petition fall far short of the mark. For example, notwithstanding Feeser's assertion directly to the contrary (Opp. at 2 n.1), the Third Circuit unequivocally held: "Since Feeser admits that the alleged discrimination terminated in 1987, the claim for injunctive relief is moot." Pet. for Cert., App. A, 15a.

Feeser raises questions regarding the record with respect to competitive health (Opp. at 5-6), but it concedes that the market was "highly competitive" (Opp. at 2-3) and petitioners' evidence of competition was completely uncontradicted in the district court. Indeed, except for a single paragraph in a single declaration, Feeser failed to object to any of this evidence. While Feeser may wish that it had contested the admissibility of this evidence, it is simply too late to make arguments not raised below.

Feeser also argues that the alleged price discrimination was "substantial and sustained." Opp. at 2, 10. But even if it was, that is irrelevant to the legal question whether the *Morton Salt* inference can override evidence of a healthy and competitive market. *See infra*. Moreover, nothing in Feeser's opposition diminishes the fact that it was able to allege only 86 instances of alleged losses from a customer base of approximately 3,000 accounts over a four-year period. *See* Pet. for Cert. at 5. Feeser concedes that it took business away from the allegedly favored competitor over this same period, and the record is clear that this included Serv business. *See* Fuller Depo. at 250, 258, 260, 267 (A. III-1367, 1370-1372); *see also* Blew Depo. at 47-48 (A. III-1303-

only review its own opinions and precedent, the statutory language and framework of the Robinson-Patman and Clayton Acts, and the opinion and legal standards of the court below as contrasted with the prevailing law in other circuits.[6]

The questions presented by the petition are of wide implication and national import. They cry out for resolution. As "the Magna Carta of free enterprise," the antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). Antitrust policy has an "indispensable role . . . in the maintenance of a free economy." *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963). "[C]ommercial arrangements throughout our economy are shaped in reliance upon this Court's decisions elaborating the reach of the antitrust laws." *Simpson v. Union Oil Co.*, 377 U.S. 13, 29-30 (1964) (Stewart, J., dissenting). It is simply intolerable that these laws be misunderstood or applied in an inconsistent and unpredictable fashion, particularly when inconsistent and confusing inter-

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1304). In *Chrysler Credit Corp.* v. *J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982), a case in which the evidence paralleled that in this case, the Fifth Circuit directed a verdict, finding as a matter of law that there was no competitive impact.

Lastly, Feeser asserts that other competitors were injured by the alleged pricing of petitioners. Opp. at 4. At best, that assertion concerns only two distributors. The only evidence relating to the injury of one distributor, Straw, was its own testimony that Serv's pricing did not injure it (*see* Straw Depo. at 91 (A. III-1493)) and that Straw actually increased Serv sales, customers, revenues and profits over the period of the alleged discrimination. *Id.* at 90 (A. III-1492). The other distributor, R&R, testified that Serv's pricing "has not injured R&R's business in any way." Spagnola Decl. (Apr. 22, 1988) at ¶¶ 2-3 (A. III-1210).

[6] If the Court finds that the Third Circuit applied the wrong standards, it can either remand the case to the court below directing it to apply the correct standards or conduct its own review and decide whether to reinstate the judgment of the district court.

pretations will discourage pro-competitive pricing and promote price uniformity. *See Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953).

2. Given the chaotic state of an important federal law, Feeser's argument that the Court should deny review because of the "interlocutory status" (Opp. at 8) of the case must be rejected. *See, e.g., Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 110 S. Ct. 1884 (1990) (reviewing case where Ninth Circuit acknowledged that its decision reversing summary judgment created conflict with the Seventh Circuit as to the meaning of antitrust injury). Indeed, where, as here, purely legal and sufficiently important questions are presented, and those questions are "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), this Court has not hesitated to grant review, despite the interlocutory nature of the judgment below.[7] In this case, no purpose would be served by sentencing the parties and the district court to additional years of expensive and time-consuming litigation if, as petitioners contend, the Third Circuit has enunciated incorrect legal standards.

Feeser understandably emphasizes tangential factual issues because it does not want this case to end. But it is universally recognized that summary judgment is an important means of regulating and managing antitrust cases and controlling court dockets. This Court has repeatedly

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[7] *See, e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, U.S. No. 90-333, *cert. granted*, Oct. 9, 1990 (granting review of court of appeals' decision reversing district court's grant of summary judgment under § 10(b) of the Securities Exchange Act of 1934); *Estelle v. Gamble*, 429 U.S. 97 (1976) (reviewing court of appeals' decision reversing district court's dismissal of complaint under 42 U.S.C. § 1983); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975) (same, § 10(b) of Securities Exchange Act of 1934); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same, sovereign immunity); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (same); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (reviewing court of appeals' decision remanding Title VII case to district court for further proceedings to resolve conflict among the circuits concerning burden of proof).

taken cases and reversed circuit court decisions in order to hear critical issues and correct erroneous application of summary judgment standards. In fact, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which involved, *inter alia*, alleged violations of the Robinson-Patman Act, the Court granted review where the court below had erroneously reversed the district court's grant of summary judgment—the precise posture of this case. *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Third Circuit's holding in this case would make it virtually impossible to obtain summary judgment in a Robinson-Patman Act case, an unfortunate consequence of its decision that makes this case that much more compelling as a candidate for review.

B. The Court Below Misapplied the Competitive Injury Standard of the Robinson-Patman Act.

1. Feeser makes the remarkable assertion (Opp. at 11) that in *Morton Salt* and *Texaco, Inc.* v. *Hasbrouck*, 110 S. Ct. 2535 (1990), this Court has already decided that injury to a single competitor is sufficient to satisfy the requirement of injury to competition of § 2(a) of the Robinson-Patman Act. That message has certainly not been received by the circuit courts. In fact, Feeser's reliance upon *Morton Salt* and *Hasbrouck* reflects a fundamental and rather inexplicable misapprehension of the issues decided in those cases and the issue presented in this case.[8] The controversy regarding competitive injury arose *after* the *Morton Salt* decision in 1948.[9] And even the court below recognized that "the precise issue of the intended scope of the Act in regard to the targeted effect on competition was

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[8] Other cases cited by Feeser also fail to prove its point. In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1983), business was lost to "Indiana retailers" who, as a whole, lost business. In *Chrysler Credit Corp.*, 670 F.2d at 580, the Fifth Circuit held that the purpose of Robinson-Patman "is to encourage competition among buyers and sellers."

[9] *See* Pet. for Cert. at 12-15 & n.29.

not before the Supreme Court on certiorari [in *Hasbrouck*]." Pet. for Cert., App. A, 21a. n.10.

Feeser simply cannot escape the fact that the decisions of the various circuit courts on the issue of competitive injury are hopelessly and categorically at odds. For example, the Third Circuit's position is now that "evidence of injury to a competitor may satisfy the component of competitive injury." Pet. for Cert., App. A, 21a-22a.[10] The Ninth Circuit (and numerous other circuits) are diametrically opposed: "Injury to a specific competitor is *not* enough from which a court may infer that an alleged price discrimination may 'substantially' injure competition." *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983) (emphasis added), *cert. denied*, 465 U.S. 1038 (1984).[11]

2. Feeser attempts (Opp. at 11) to distinguish the cases cited by petitioners on the theory that those cases are "primary line" cases whereas this case is a "secondary line" case. That argument completely misses the point. There may be some differences between primary and secondary line cases, but those differences are not material to the question whether injury to a single competitor equates with injury to competition.[12] A number of secondary line cases hold, contrary to the court below, that injury

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[10] *See also Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989).

[11] *See also, e.g., Boise Cascade Corp.*, 837 F.2d at 1143; *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986).

[12] Feeser points out (Opp. at 11) that in *Hasbrouck* the Court noted that it has "proven useful . . . to distinguish" between primary line cases involving a claim that a seller's price differential injured its own competitors and secondary line claims brought by allegedly disfavored purchasers. 110 S. Ct. at 2543 n.15. But *Hasbrouck* itself refutes Feeser's argument that that semantic distinction requires application of different legal standards. In *Hasbrouck*, the Court expressly concluded that its rationale in a primary line case, *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), was equally applicable to secondary line claims. *Hasbrouck*, 110 S. Ct. at 2543-44.

to a single competitor is insufficient to fulfill § 2(a)'s competitive injury requirement. *See, e.g., Foremost Pro Color, Inc.*, 703 F.2d at 548; *Richard Short Oil Co.*, 799 F.2d at 420; *American Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).[13] With respect to the meaning of competitive injury, § 2(a) itself makes no distinction between primary and secondary line cases.

3. Feeser responds to petitioners' contention that the court below misapplied *Morton Salt* by distorting that contention beyond recognition, asserting that petitioners have contended that *Morton Salt* no longer represents a viable doctrine in the appropriate case. Opp. at 12. But that is not the point at all.

One of the several conflicts among the circuits presented by this case involves the scope of *Morton Salt*'s inference of competitive injury in cases in which the facts demonstrate a healthy, competitive environment and growth by every market participant. The Third Circuit's resolution of this question placed it directly at odds with other courts of appeals.

The Third Circuit in this case held that *Morton Salt* should be conclusively applied irrespective of the nature of the competitive environment. *See* Pet. for Cert., App. A, 27a-31a. On the other hand, in *Boise Cascade*, the D.C. Circuit held that, to the extent that *Morton Salt* allows any inference at all, it may be rebutted by "[s]pecific, substantial evidence of absence of competitive injury . . . . " 837 F.2d. at 1144 (citation omitted).[14] *See Falls*

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[13] Feeser's opposition makes the point (at 13-14) that these and other cases cited by petitioners are distinguishable because they find *Morton Salt* inapplicable. However, this is precisely petitioners' point. *Morton Salt* is not applicable in this case (*see infra*) and injury to a single competitor is insufficient to establish competitive injury under § 2(a).

[14] Feeser attempts to make it appear that the court below merely did what the D.C. Circuit did in *Boise Cascade* when that court remanded that case back to the FTC. That is not so. Rather, what the Third Circuit did below was exactly what the D.C. Circuit said the FTC could *not* do in *Boise Cascade*—refuse to consider evidence of

City, 460 U.S. at 435 (*Morton Salt* inference may be overcome). Feeser has not (and cannot) contend that this approach can be reconciled with the Third Circuit's view in this case.

Feeser is also incorrect when it suggests that the courts must always engage in the *Morton Salt* inference analysis. Only last Term, this Court concluded that the *Morton Salt* inference does not automatically arise in every case. In *Hasbrouck*, the Court held with respect to the competitive effects of legitimate functional discounts that "the inference of injury to competition recognized in the *Morton Salt* case will simply not arise." 110 S. Ct. at 2550. It also has been recognized that the competitive injury requirement of § 2(a) "does not justify abdication of the duty to consider evidence indicating that 'reasonable possibility' of harm does not, in fact, exist in the particular industry." *Boise Cascade*, 837 F.2d at 1146.

In this case, Feeser conceded that petitioners' discrimination ended almost five years ago, and the facts demonstrate that there has been no injury to competition. Indeed, competition thrived and Feeser itself grew in every conceivable way, even in sales of Serv products. To apply *Morton Salt* under such circumstances, would exalt theory over facts. "That curious rule, if it ever was a rule, has been scotched by *Falls City's* teachings." *Boise Cascade*, 837 F.2d at 1146.

C. The Antitrust Injury Standard Applied by the Court Below Revives the "Automatic Damages" Rule.

1. The court below removed § 4's causation requirement from the Clayton Act by equating the competitive injury requirement of § 2(a) of the Robinson-Patman Act with the actual injury requirement of § 4 of the Clayton Act. Feeser defends the Third Circuit's standard, arguing that "the

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competition. The Third Circuit in this case did not remand this case to consider the competitive evidence put forward by petitioners, but rather transformed Robinson-Patman into a *per se* statute by holding that evidence of competition could be ignored in favor of a conclusive presumption of competitive injury.

evidence necessary to establish . . . competitive injury . . . [under § 2(a)] is the same as that used to establish actual injury." Opp. at 16 n.29.

That articulation of the antitrust injury requirement is in direct conflict with decisions of this Court. In *J. Truett Payne Co.*, this Court established that "proof of a violation [of § 2(a)] does *not* mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4." 451 U.S. at 562 (emphasis added). *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969).

2. According to Feeser (Opp. at 16-17), the actual injury requirement can be met solely by reference to price differentials at both the distributor and end user levels, evidence of lost sales and an opinion of an expert witness. However, that approach is little more than a variation of the "automatic damages" rule rejected by the Court in *Truett Payne*. Price differences (coupled with lost sales) do not prove that the alleged discrimination in prices *caused* differences in the prices charged to end users. Price differences alone take no account of such variables as loss leading, efficiency and overhead costs. Where, as here, the evidence establishes that Weis, the allegedly favored customer, did not pass on discounts and allowances to its customers (Bowers Decl. at ¶ 7 (A. III-1222)), it has not been established that any alleged price discrimination *caused* a difference in prices to end users.[15]

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[15] Feeser asserts that Weis's General Manager testified that Weis passed on discounts and allowances (Opp. at 17 n.30), but the testimony cited by Feeser relates to completely unrelated claims against a different defendant, Hunt-Wesson, which settled with Feeser and is no longer a party to this case. In addition, Feeser claims that "the record contains probative evidence" that "Weis sold Serv products . . . at prices below [Feeser's] cost," Opp. at 17 n.30, but even if that were true, it does nothing to eliminate the possibility that Weis used Serv products as a "loss leader" to entice customers to purchase products. Feeser's only other causation evidence, a conclusory expert report, cannot satisfy the causation requirement. *Chrysler Credit Corp.*, 670 F.2d at 581; *Truett Payne*, 451 U.S. at 569-70 (Powell, J., concurring in part and dissenting in part).

3. As explained in the petition, at 27-29, the court below subverted the applicable summary judgment standards developed by this Court by confusing and misapplying the standard of proof applicable to causation with the more lenient standard governing proof of the amount of damages. The Court of Appeals made it plain that it understood that a plaintiff's burden on liability was so minimal as to require only "some *attempt* to link the discrimination to harm to the plaintiff . . . . " Pet. for Cert., App. A, 32a (emphasis added). However, the decisions of this Court and of other circuits make clear that the standards for causation are significantly more stringent than those applied to determine the amount of damages. *See, e.g., Chrysler Credit Corp.*, 670 F.2d at 582 ("Only when the plaintiff has demonstrated the *fact* of injury may the court be lenient in the *amount* of evidence required to prove damages.") (emphasis added); *Hasbrouck v. Texaco, Inc.* 842 F.2d 1034, 1042 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990).

Feeser makes the same mistake. In discussing causation (Opp. at 15-16), it relies upon decisions that address the standards for resolving "damages issues."[16] Contrary to Feeser's suggestion, the Court in *Hasbrouck* emphasized the *impropriety* of blurring the distinction between liability and damages issues; it did not eradicate that distinction. 110 S. Ct. at 2551.[17]

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[16] *See, e.g., Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946).

[17] Feeser also contends that *Morton Salt* renders evidence of overall success by the alleged victim of price discrimination irrelevant where the products at issue represent only a "small part of plaintiffs' business." Opp. at 18. However, while *Morton Salt* may allow courts to infer competitive injury under § 2(a) in certain circumstances, it has no applicability to § 4's independent requirement of actual injury; a mere demonstration—by inference or otherwise—of a § 2(a) violation cannot serve to prove injury under § 4. *See Truett Payne*, 451 U.S. at 561.

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